

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 -----  
4 August Term, 2004  
5

6 (Argued: June 20, 2005

Decided: August 15, 2005)

7  
8 Docket No. [s]: 04-5306-cv(L), 04-5768-cv(CON)

9 -----X  
10 WELLS FARGO BANK, N.A., f/k/a Wells Fargo Bank Minnesota, N.A.,  
11 Indenture Trustee,

12 Plaintiff-Appellee,  
13

14 - v. -

15 BROOKSAMERICA MORTGAGE CORPORATION and MICHAEL WAYNE BROOKS,  
16 Defendants-Appellants.

17 -----X  
18 Before: MINER and STRAUB, Circuit Judges, and KEENAN\*, District  
19 Judge.  
20

21 Appeal from a judgment granting Plaintiff-Appellee's motion  
22 for summary judgment and denying Defendants-Appellants' cross-  
23 motion for summary judgment entered in the United States District  
24 Court for the Southern District of New York (Baer, J.).

25 AFFIRMED.

26  
27  
28 STEVEN D. KARLIN, Platzer,  
29 Swergold, Karlin, Levine, Goldberg  
30 & Jaslow, New York, NY, for  
31 Defendants-Appellants.  
32

1 ROBERT A. JAFFE (Jeffrey S.  
2 Jacobovitz and Ellen Bass, on the  
3 brief), Kutak Rock LLP, Washington,  
4 DC, for Plaintiff-Appellee.  
5

6 KEENAN, District Judge:

7 BrooksAmerica Mortgage Corporation ("BrooksAmerica") and its  
8 principal officer, Michael Wayne Brooks ("Brooks"), appeal from  
9 the denial of their motion for summary judgment, and from the  
10 grant of the cross-motion for summary judgment of Wells Fargo  
11 Bank, N.A. ("Wells Fargo"). The United States District Court for  
12 the Southern District of New York (Baer, J.) awarded Wells Fargo  
13 all rental payments past due under an equipment lease, with pre-  
14 judgment interest thereon; all present and future rent payments  
15 as they become due and owing; and attorneys' fees as provided  
16 under the lease. Appellants contend that the court erred in  
17 granting this relief and that it should properly have granted  
18 them summary judgment, dismissing the action. Because the  
19 district court was correct in holding the lease contract, and  
20 particularly the "hell or high water" clause contained therein,  
21 valid, we affirm.  
22

## 23 BACKGROUND

24

25 Defendant-Appellant BrooksAmerica Mortgage Corp.  
26 ("BrooksAmerica"), in late 2000, found itself in need of capital.  
27 To obtain it, BrooksAmerica entered into a transaction

1 ("Transaction") with Terminal Marketing Co. ("Terminal") pursuant  
2 to which BrooksAmerica would sell some of its computer equipment  
3 ("Equipment") to Terminal for approximately \$250,000, and  
4 Terminal would, in turn, lease that equipment to BrooksAmerica  
5 for \$9,827.66 per month for thirty-six months. At the end of the  
6 thirty-six months, BrooksAmerica would have the option to re-  
7 purchase the equipment for \$101.

8  
9 On October 26, 2000, Michael Wayne Brooks ("Brooks"), as  
10 principal of BrooksAmerica, signed several documents to effect  
11 the Transaction. The first document was labeled a "Lease" and  
12 included two clauses that are of significance in this case. The  
13 first clause, known as a "hell or high water" clause, made  
14 BrooksAmerica's obligation to make monthly payments "absolute and  
15 unconditional." Contract ¶ 5. The second clause provided that  
16 the contract was assignable by Terminal without notice, and that  
17 an assignee's rights "SHALL BE FREE FROM ALL DEFENSES, SETOFFS OR  
18 COUNTERCLAIMS WHICH LESSEE MAY BE ENTITLED TO ASSERT." Contract  
19 ¶ 14 (emphasis in original).

20  
21 Brooks also signed a "Delivery and Acceptance Certificate"  
22 ("Certificate"), which stated that Terminal had "fully and  
23 satisfactorily performed all covenants and conditions required to  
24 be performed . . . under the lease," and reiterated

1 BrooksAmerica's assent to assignment of the lease, to the  
2 "absolute and unconditional" obligation to make monthly payments,  
3 and to the waiver of defenses against any assignee. At the same  
4 time, Brooks signed a Bill of Sale that transferred the equipment  
5 and all BrooksAmerica's rights therein to Terminal. Brooks  
6 signed all these documents even though Terminal had not yet paid  
7 BrooksAmerica the \$250,000 for the equipment.

8  
9 About one month later, in late November 2000, Terminal sold  
10 and assigned its interest in the lease to a related business  
11 entity, Terminal Finance Corporation II ("TFC II"), an entity  
12 formed for the sole purpose of facilitating transactions of this  
13 sort. Neither Terminal nor TFC II are parties to this action.

14  
15 TFC II borrowed the funds to purchase the lease from a group  
16 of investors, or noteholders, for whom Wells Fargo acts as  
17 indenture trustee, and assigned the lease to Wells Fargo. In  
18 all, the noteholders paid over \$245,000 towards the purchase of  
19 the lease. Thus, Wells Fargo holds all rights and interests in  
20 the lease and in the equipment at issue in the Transaction.

21  
22 A few months elapsed, during which time, according to  
23 BrooksAmerica, additional negotiations took place even though the  
24 relevant documents had already been signed. However,

1 BrooksAmerica did not receive payment from Terminal for the sale  
2 of the equipment. BrooksAmerica sent a check for the first and  
3 last months' lease payments, but stopped payment on that check  
4 when the lump sum from Terminal did not materialize. It turns  
5 out that Terminal, shortly after executing the contract, ran out  
6 of money and ceased operations.

7  
8 When BrooksAmerica failed to make payments under the lease,  
9 Wells Fargo brought this breach of contract and declaratory  
10 judgment action against BrooksAmerica in New York State Supreme  
11 Court. BrooksAmerica then removed the case to the United States  
12 District Court for the Southern District of New York based on the  
13 court's diversity jurisdiction. BrooksAmerica is a California  
14 corporation with its principal place of business in California;  
15 Michael Brooks is a resident of California; and Wells Fargo is a  
16 national bank with its principal place of business in Minnesota.

17  
18 The parties cross-moved for summary judgment. Wells Fargo  
19 contended that, based on the documents signed by Michael Brooks,  
20 Wells Fargo was entitled to all back payments on the lease, in  
21 addition to all future payments, plus pre-judgment interest and  
22 attorneys' fees. BrooksAmerica argued that the case should be  
23 dismissed. The district court granted Wells Fargo's motion and  
24 denied BrooksAmerica's motion. This appeal followed.

1

2 **DISCUSSION**

3

4 We begin by noting our agreement with the thoughtful and  
5 well-reasoned opinion of the district court. We write only to  
6 confirm that, under New York Law, "hell or high water" clauses  
7 are enforceable in the context presented here, i.e., by good  
8 faith assignees against sophisticated parties.<sup>1</sup>

9

10 We review a district court's grant of summary judgment de  
11 novo and to determine whether the court properly concluded that  
12 there was no genuine issue of material fact so that the moving  
13 party was entitled to judgment as a matter of law. Miller v.  
14 Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003).  
15 Likewise, the interpretation of a contract is reviewed de novo.  
16 See Rubens v. Mason, 387 F.3d 183, 188 (2d Cir. 2004).

17

18 The hell or high water clause at issue here makes  
19 BrooksAmerica's obligation to pay rent absolute and  
20 unconditional. In the context of a finance lease containing a  
21 hell or high water clause, the lessee must make payments  
22 regardless of defective performance on the part of the lessor,

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<sup>1</sup>The parties agree that New York law, which is designated in the contract, applies in this case.

1 that is, "come hell or high water." See 19 Richard A. Lord,  
2 Williston on Contracts § 53:28 (4th ed. 2004) (hereinafter  
3 "Williston"). At the district level, "[c]ourts have uniformly  
4 given full force and effect to 'hell and high water' clauses in  
5 the face of various kinds of defaults by the party seeking to  
6 enforce them." In re O.P.M. Leasing Servs., Inc., 21 B.R. 993,  
7 1006-07 (Bankr. S.D.N.Y. 1982). Likewise, the Tenth Circuit has  
8 held that, in the absence of fraud, the lessor's performance, or  
9 any other fact that a lessee might submit in opposition to  
10 summary judgment, is irrelevant. See Colo. Interstate Corp. v.  
11 CIT Group Equip. Fin., Inc., 993 F.2d 743, 749 (10th Cir. 1993);  
12 O.P.M., 21 B.R. at 1007; Williston § 53.28.

13  
14 BrooksAmerica's attempt to frame the issue as one of  
15 Terminal's non-performance, such that BrooksAmerica's obligations  
16 under the lease never arose at all, is unavailing. Non-  
17 performance by the lessor is irrelevant, at least when the lessee  
18 was a sophisticated party and the party asserting the right to  
19 rental payments is a good-faith assignee. See N.Y. U.C.C. § 9-  
20 403(c) (an agreement by parties that the contract can be assigned  
21 free of any defenses which an account-debtor may have against the  
22 assignor is enforceable by a good-faith, for-value assignee  
23 against ordinary defenses, not including fraud, duress, or the  
24 like); § 3-305(a) (generally, setting forth rights of a holder in

1 due course).<sup>2</sup>

2  
3 BrooksAmerica does not dispute that Wells Fargo purchased  
4 the lease assignment in good faith and for value. Moreover, as a  
5 certified mortgage broker with over twenty years' experience,  
6 Michael Brooks is a sophisticated businessman who willingly  
7 executed an unambiguous contract and accompanying documents.  
8 This Court will not bail him and BrooksAmerica out just because  
9 they are now unhappy with the contract. See John Hancock Mut.  
10 Life Ins. Co. v. Amerford Intern. Corp., 22 F.3d 458, 462 (2d  
11 Cir. 1994). Their dissatisfaction is more properly aimed at  
12 Terminal, the alleged wrongdoer.

13  
14 **CONCLUSION**

15  
16 For the foregoing reasons, we affirm the district court's  
17 grant of Wells Fargo's motion, and denial of BrooksAmerica's  
18 cross-motion, for summary judgment.

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<sup>2</sup>Given the facts of this case, we need not reach the issue of whether, under New York Law, "hell or high water" clauses are enforceable in all circumstances.